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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92044571
Party	Plaintiff 200 Kelsey Associates, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

200 Kelsey Associates, LLC, Petitioner, v. One Step Up Ltd., Successor-in-Interest to Delan Enterprises, Inc., Registrant.	Cancellation No.: 92/044,571

PETITIONER'S TRIAL BRIEF

and

MOTION TO STRIKE REGISTRANT'S TRIAL EXHIBITS

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PRELIMINARY STATEMENT

This proceeding involves a single issue, namely, whether Registration Nos. 549,924 and 937,651 for the mark JONATHAN LOGAN for use in connection with women's clothing in Int'l Class 25 are subject to cancellation on the ground of abandonment by virtue of non-use of the mark in U.S. commerce for the three-year period preceding the filing of this action on May 31, 2005.

There is no dispute about the abandonment of Registration No. 549,924. There is not a shred of evidence that has been produced in this case that confirms, references or even suggests use of the JONATHAN LOGAN mark in connection with the goods identified in the registration -- women's dresses -- at any time after the registration was renewed on December 13, 2001.

Registration No. 937,651 covers a wider array of women's clothing in Class 25, namely, "women's dresses, pant suits, pants, shorts, culottes, blouses, jackets, vests and coats." To rebut the claim of abandonment, the current Registrant, One Step Up, Ltd., has come forward with evidence showing sales of JONATHAN LOGAN brand clothing to a single retailer, Burlington Coat Factory. However, as set forth below in Petitioner's Motion to Strike, this evidence is objectionable and should be excluded from the trial record because: (1) Registrant unfairly surprised Petitioner by first producing certain documents during trial; (2) many of the invoices are not relevant because they show product sales that post-date the filing of this proceeding on May 31, 2005; and (3) the evidence constitutes inadmissible hearsay, lacks foundation and proper authentication because it was introduced by witnesses who were not qualified for that purpose. Indeed, there is no admissible, relevant and material evidence of record to demonstrate sales of JONATHAN LOGAN brand clothing to its retail store customers during the applicable time period. Nor is there any evidence whatsoever reflecting sales of JONATHAN LOGAN brand clothing to consumers at any time.

The evidence properly of record demonstrates that Petitioner, 200 Kelsey Associates, LLC, has established a prima facie case of abandonment of Registration Nos. 549,924 and 937,651. Accordingly, Petitioner respectfully requests that the Board sustain this proceeding and cancel the two registrations, and for such other and further relief as the Board deems just and proper.

PROCEEDINGS HEREIN

I. PROCEDURAL HISTORY

On August 19, 2004, Petitioner filed trademark application Serial No. 78/469,921 for the mark JONATHAN LOGAN for use in connection with a wide array of women's clothing in Int'l Class 25. On March 24, 2005, the PTO issued an Office Action refusing registration of Petitioner's mark pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with Registration Nos. 549,924 and 937,651 for the JONATHAN LOGAN mark.

Petitioner commenced the instant proceeding by filing a Petition for Cancellation of Registration Nos. 549,924 and 937,651 on May 31, 2005. (D.I. 1).[1] The Petition sought cancellation on the sole ground of abandonment.

On September 1, 2005, Registrant's predecessor-in-interest, Delan Enterprises, Inc., filed an Answer containing general denials to the salient allegations of the Petition for Cancellation. (D.I. 5).

On January 23, 2006, Delan Enterprises filed a Motion for Summary Judgment asking the Board to find that it had not abandoned Registration Nos. 549,924 and 937,651 as a matter of law. (D.I. 9). On October 12, 2006, the Board issued an order denying Delan Enterprises' motion. (D.I. 13).

[1] The designation "D.I." refers to the Board's Docket Index for the current proceeding.

On February 6, 2007, the Board granted One Step Up's application to be joined as a party-defendant in light of the fact that One Step Up had acquired the registrations from Delan Enterprises by assignment on April 5, 2006. (D.I. 18).

Both parties presented testimony and introduced documentary evidence at trial, which concluded on November 24, 2007.

II. EVIDENCE AUTOMATICALLY OF RECORD

The file of the subject Registrations, Petitioner's Petition for Cancellation and Registrant's Answer to the Petition for Cancellation are of record pursuant to 37 C.F.R. 2.122.

III. PETITIONER'S EVIDENCE

Petitioner introduced the Testimonial Deposition of Michael Reich, Petitioner's Managing Member, dated July 30, 2007 ("Pet. Tr. Dep."), with accompanying Exhibits 1 through 4.

IV. REGISTRANT'S EVIDENCE

Registrant introduced the following evidence:

1. Testimonial Deposition of Stacy J. Haigney, General Attorney for Burlington Coat Factory, dated October 2, 2007 ("Haig. Tr. Dep."), with accompanying Exhibits 1 through 8; and,

2. Testimonial Deposition of Harry Adjmi, President of One Step Up, dated October 2, 2007 ("Adj. Tr. Dep."), with accompanying Exhibits 9 through 14.

Neither party filed a Notice of Reliance.

MOTION TO STRIKE REGISTRANT'S TRIAL EVIDENCE

In accordance with the objections raised on the record during the testimonial depositions of Messrs. Haigney and Adjmi, and the accompanying Declaration of Edmund J. Ferdinand, III, Esq. ("Ferdinand Dec."), dated January 23, 2008, filed herewith, Petitioner respectfully moves to strike from the trial record virtually all of the exhibits introduced by Registrant at trial.[2]

The following chart summarizes the objections that Petitioner will discuss in greater detail below:

Exhibit No.	**Failed to Produce During Discovery - Unfair Surprise**	**Irrelevant - Falls Outside of Applicable Time Period for Abandonment**	**Hearsay, Lack of Foundation and Authentication - Introduced by Unqualified Witness**
2		√	
3, 4		√	√
5			√
6	√		√
7, 8	√		√
10		√	
11, 12		√	√
13			√
14		√	√

[2] Petitioner does not object to Exhibits 1 or 9, the Notices of Testimonial Deposition for Messrs. Haigney and Adjmi.

I. UNFAIR SURPRISE

Petitioner objects to Registrant's attempt to offer into evidence during the trial phase of the case three documents that Registrant failed to produce to Petitioner during discovery, despite due demand therefor. In support of this objection, Petitioner states that during discovery it served on Registrant a comprehensive First Set of Requests for Production, which sought documents evidencing, *inter alia*, Registrant's sales of JONATHAN LOGAN brand clothing in the U.S. for each year from 2000 to 2006. (*See* Ferdinand Dec., Tab 1). In response, Registrant produced 151 pages of documents on or about January 13, 2007. (*Id.* ¶ 3, Tab 2). Pursuant to the Board's Scheduling Order, as amended by the parties by stipulation, the discovery phase of the case closed on April 13, 2007.

On September 28, 2007, during Registrant's testimony period and just two business days prior to the scheduled testimonial depositions of Messrs. Haigney and Adjmi on October 2, 2007, Registrant sought to serve additional documents on Petitioner. (Ferdinand Dec. ¶ 6, Tab 3). Counsel for Petitioner immediately objected in writing on the ground of unfair surprise. (*Id.*, Tab 4).

At the testimonial deposition of Mr. Haigney on October 2, 2007, Registrant marked as Exhibit 6 several invoices dated March, 2005. These invoices were among the documents Registrant first sent to Petitioner on September 28, 2007. (Ferdinand Dec. ¶ 8). In addition, Registrant marked as Exhibits 7 and 8 copies of computer printouts purporting to show purchases by Burlington Coat Factory of JONATHAN LOGAN merchandise. Registrant had never served these documents on Petitioner prior to Mr. Haigney's testimonial deposition. (*Id.* ¶ 9).[3]

[3] Apparently Mr. Haigney brought these documents with him to the testimonial deposition and gave them to Registrant's counsel for the first time that morning. (Haig. Tr. Dep. at 59).

Registrant's Exhibits 6, 7 and 8 are all responsive to Petitioner's document requests and, accordingly, should have been produced during discovery, but were not. Hence, Petitioner moves to strike Registrant's Exhibits 6, 7 and 8, and all testimony related thereto, on the ground of unfair surprise. It is well settled in Board proceedings that parties cannot produce documents for the first time during trial. *See National Aeronautics and Space Administration v. Bully Hill Vineyards, Inc.*, 3 U.S.P.Q.2d 1671, 1672 n. 3 (T.T.A.B. 1987) (excluding from consideration documents that applicant failed to produce during discovery and then sought to rely upon at trial); *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 U.S.P.Q.2d 1671, 1677 (T.T.A.B. 1988); *Shoe Factory Supplies Co. v. Thermal Engineering Co.*, 207 U.S.P.Q. 517, 519 n. 1 (T.T.A.B. 1980); *Weiner King, Inc. v. The Wiener King Corp.*, 204 U.S.P.Q. 820, 828 (C.C.P.A. 1980).[4]

II. RELEVANCE

Pursuant to 15 U.S.C. § 1127, "[n]onuse for 3 consecutive years shall be prima facie evidence of abandonment." Petitioner contends that Registrant abandoned the JONATHAN LOGAN mark by failing to use the mark in commerce in connection with women's clothing for the three-year period prior to the filing of the instant Petition for Cancellation on May 31, 2005. Hence, the relevant time period for examining Registrant's use of the mark in commerce is from May 31, 2002 to May 31, 2005.

Petitioner objects to Registrant's Exhibits 2-4, 10-12 and portions of Exhibit 14 on relevance grounds because these documents reflect activity related to the JONATHAN LOGAN brand either prior to May 31, 2002, or after May 31, 2005. *See* Fed. R. Evid. 401, 402.

[4] This legal principle is confirmed by several recent non-citable Board opinions. *See Grow Company, Inc. v. Biotest Laboratories, LLC*, 2004 TTAB LEXIS 25 (T.T.A.B. Jan. 22, 2004); *Quality Candy Shoppes/Buddy Squirrel of Wisconsin, Inc. v. Grande Foods*, 2007 TTAB LEXIS 85 (T.T.A.B. September 5, 2007); *Mana Products, Inc. v. Black Onyx, Inc*, 2001 TTAB LEXIS 623 (T.T.A.B. Aug. 15, 2001).

Exhibit 2 is a newspaper insert produced by Burlington Coat Factory that depicts an advertisement for a JONATHAN LOGAN brand pant suit. (*See* OSU 00114). The cover page states that the coupon must be used prior to April 6, 2002 and, as such, Mr. Haigney confirmed that the insert must have been distributed prior to that date, and possibly as much as six weeks prior. (Haig. Tr. Dep. at 36-37).

Registrant's Exhibits 3 and 4 are pre-order forms that Mr. Haigney believes were prepared by Registrant's predecessor-in-interest for submission to Burlington Coat Factory. (Haig. Tr. Dep. at 38-40). The documents were created and transmitted in 2005, as indicated by the facsimile line at the top of each page, and list a "completion" (*i.e.* shipping) date of "7/15-7/30" for Exhibit 3 and "8/30-9/05" for Exhibit 4. Hence, any shipment of merchandise to Burlington Coat Factory would not have taken place until after the filing of this proceeding on May 31, 2005.

The invoices included in Registrant's Exhibit 10 are all dated in 2006 – long after the filing of the instant Petition for Cancellation. Likewise, the invoices contained in Exhibits 11 and 12 are either all dated after May 31, 2005, or they contemplate shipping product after that date. In either case, JONATHAN LOGAN product would not have appeared on store shelves until after the filing of the instant Petition for Cancellation.

Finally, Exhibit 14 is a copy of Registrant's summary judgment briefing, supporting declarations and exhibits. Included among these documents are several copies of the same receipt for purchase of two units of JONATHAN LOGAN merchandise at an Annie Sez store. (OSU 0004, 0013). The first page of Exhibit 14 confirms that the items in question were purchased on September 20, 2005, after the filing of the instant proceeding.

Hence, Exhibits 2-4, 10-12 and the receipt attached at Exhibit 14 should be excluded from consideration on relevance grounds because these documents do not impact the three-year period immediately preceding the filing of this cancellation proceeding.

III. HEARSAY, FOUNDATION AND AUTHENTICATION

Petitioner objects to the introduction of Exhibits 3 through 8 and 11 through 14 pursuant to Federal Rules of Evidence 803(6), 602 and 901 on the grounds of hearsay, lack of foundation and lack of authentication. Messrs. Haigney and Adjmi were simply not proper witnesses to introduce these exhibits into evidence at trial.

Exhibits 11, 12 and 13 all contain invoices that pre-date One Step Up's acquisition of the JONATHAN LOGAN brand on April 5, 2006. Mr. Adjmi confirmed on cross-examination that he had no knowledge of any matter pertaining to the JONATHAN LOGAN brand prior to the date his company acquired the marks in April, 2006. (Adj. Tr. Dep. at 19-20). In fact, Mr. Adjmi conceded that he was not the custodian of records of the documents at the time the documents were prepared. (*Id.* at 22). This is confirmed by Registrant's Interrogatory Responses, which deny any knowledge of pre-assignment sales of JONATHAN LOGAN brand clothing. (Pet. Tr. Dep., Exh. 4 at p. 4). Hence, Exhibits 11 through 13 should be excluded under Fed. R. Evid. 803(6), 602 and 901 because the documents are not self-authenticating, Mr. Adjmi concedes that he has no personal knowledge of any pre-2006 activity and he also conceded that he was not the custodian of these documents at the time they were created. If Registrant had wanted to introduce sales records that pre-dated the assignment of the registrations in 2006, Registrant was obligated to call as a trial witness an individual who was competent to testify about the documents and the information contained therein, namely an employee of the prior owner, Delan Enterprises. Registrant failed to do so, and as a result Exhibits 11 through 13 should be excluded on this basis alone.

Similarly, Mr. Haigney was not qualified to authenticate and testify about Exhibits 3 through 8 at trial. He is the General Attorney for Burlington Coat Factory. His principal responsibility is to work with outside counsel to manage the company's litigation. (Haig. Tr. Dep. at 4-5, 33-34). He is not involved in buying merchandise from vendors, negotiating purchase orders, entering sales information into the company's computer systems, allocating merchandise among the company's various stores or selling the merchandise to customers. (*Id.* at 34-36). With respect to Exhibits 7 and 8, Mr. Haigney testified that he asked the company's purchasing manager to obtain the information. (*Id.* at 50-52). Yet, Mr. Haigney had no personal knowledge of these documents whatsoever, either with respect to how they were created or the accuracy of the information contained therein. With respect to their creation, he said his knowledge was nothing more than "informed speculation." (*Id.* at 13). He said he "didn't discuss them" with the manager who provided them. (*Id.* at 14). Moreover, he could not confirm the accuracy of the information contained therein. He testified that "I will be frank with you and say that I did not go through [Exhibits 7 and 8] comparing them to make sure that ...." Exhibits 7 and 8 were compatible. (*Id.* at 14). When asked why Exhibits 7 and 8 differed, he candidly testified that "Well, I got to tell you, I'm wondering now. I really confess that I haven't looked at them that closely." (*Id.* at 52). Based on Mr. Haigney's testimony, it is clear that he was not qualified to authenticate Exhibits 3 through 8 and, therefore, the documents should be excluded pursuant to Fed. R. Evid. 803(6), 602 and 901. As the Official Comment to Fed. R. Evid. 803(6) provides, "If, however, the supplier of the information does not act in the regular course, an essential link is broken, the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail." Such is the case here.

Finally, Exhibit 14 contains declarations of Melissa Higgins and Rudy Delvechio that

Registrant submitted in connection with its summary judgment motion. Petitioner objects to the introduction of these documents at trial because the statements contained therein constitute inadmissible hearsay, and Petitioner was never afforded an opportunity to cross-examine these witnesses during trial. Accordingly, the declarations should be excluded pursuant to Fed. R. Evid. 802. *See NLRB v. McClure Associates, Inc.*, 556 F.2d 725 (4th Cir.1977).

IV. ATTORNEY COMMUNICATIONS

Petitioner objects to Exhibit 14 to the extent it contains several pages of communications between counsel for Petitioner and Registrant. The documents have no bearing on any substantive issue at trial and, therefore, should be excluded on relevance grounds. Moreover, Petitioner's counsel's communications were prepared in the context of a possible dismissal of the action and are tantamount to settlement communications. Accordingly, Petitioner moves to strike pages OSU 27-34 of Registrant's Exhibit 14 under Rules 402 and 408 of the Federal Rules of Evidence.

V. TESTIMONIAL DEPOSITION OBJECTIONS

Petitioner objects to certain portions of the testimonial depositions of Messrs. Haigney and Adjmi on the grounds of form, relevance, foundation and hearsay. All such objections are detailed for the Board's reference in the transcripts and will not be repeated herein.

STATEMENT OF FACTS

Registrant is the owner, by assignment, of two federal registrations for JONATHAN LOGAN (Stylized):

1. Reg. No. 549,924 for "women's dresses" in Int'l Class 25. This registration was renewed on December 13, 2001.

2. Reg. No. 937,651 for "women's dresses, pant suits, pants, shorts, culottes, blouses, jackets, vests and coats" in Int'l Class 25. This registration was renewed on December 13, 2001.

Petitioner is a brand management and licensing company. (Pet. Tr. Dep. at 5). Michael Reich is Petitioner's Managing Member. Mr. Reich has a long history in the licensing industry, including ownership of a prominent manufacturer and distributor of licensed products. (*Id.* at 6-8).

JONATHAN LOGAN was at one point a major apparel brand that was widely marketed and sold in the U.S. (*Id.* at 9). As of 2000, Mr. Reich no longer saw the product offered for sale at retail stores. (*Id.* at 9-10). Mr. Reich continued to monitor the JONATHAN LOGAN brand at retail stores. (*Id.*). By 2004, due to the absence of JONATHAN LOGAN brand clothing in the marketplace, Petitioner had concluded that the mark had gone abandoned and was in the public domain. (*Id.* at 12).

On August 19, 2004, Petitioner filed trademark application Serial No. 78/469,921 for the mark JONATHAN LOGAN for use in connection with a wide array of women's clothing in Int'l Class 25. (Pet. Tr. Dep., Exh. 2). On March 24, 2005, the PTO issued an Office Action refusing registration of Petitioner's mark pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with Registration Nos. 549,924 and 937,651 for the JONATHAN LOGAN mark. (Pet. Tr. Dep., Exh. 3).

Petitioner commenced the instant proceeding by filing a Petition for Cancellation of Registration Nos. 549,924 and 937,651 on May 31, 2005. (D.I. 1).

Registrant acquired Registration Nos. 549,924 and 937,651 from the prior owner, Delan Enterprises, via an assignment dated April 5, 2006. The assignment was recorded with the PTO on July 20, 2006. (*See* D.I. 18; Reel/Frame 3367/0535). Registrant admitted that it has no knowledge

of any sales or marketing activity for the JONATHAN LOGAN brand prior to the date it acquired the marks in 2006. (Pet. Tr. Dep., Exh. 4 at p. 4).

QUESTION PRESENTED

The sole issue before the Board is whether Registration Nos. 549,924 and 937,651 for the mark JONATHAN LOGAN for use in connection with women's clothing in Int'l Class 25 should be cancelled on the ground of abandonment by virtue of non-use of the mark in U.S. commerce for the three-year period preceding the filing of this action on May 31, 2005.

ARGUMENT

I. STANDING

Petitioner has standing to bring and maintain this action because it has shown that it has been damaged by the maintenance of Registration Nos. 549,924 and 937,651 on the Principal Register. These registrations were the basis for the Examining Attorney's Section 2(d) refusal to register Petitioner's Trademark Application Serial No. 78/469,921 for the mark JONATHAN LOGAN. (Pet. Tr. Dep., Exh. 3). Thus, Petitioner's application will not mature into a federal registration unless and until Registration Nos. 549,924 and 937,651 are cancelled. Based on these facts, Petitioner has standing to bring and maintain this proceeding. *See* 15 U.S.C. § 1064; *Ritchie v. Simpson*, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999).

II. ABANDONMENT

The Trademark Act provides for the cancellation of registrations if the registered mark has been abandoned. 15 U.S.C. § 1064. Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a mark shall be deemed to be "abandoned" as follows:

> When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. "Use"

> of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

Because registrations are presumed valid, Petitioner bears the burden of proving a *prima facie* case of abandonment by a preponderance of the evidence. *See On-Line Careline Inc. v. America Online Inc.*, 56 U.S.P.Q.2d 1471 (Fed. Cir. 2000). Proof of non-use for three consecutive years constitutes *prima facie* evidence of abandonment because it carries an inference of lack of intent to resume use. *See* 15 U.S.C. § 1127; *Emergency One, Inc. v. American FireEagle, Ltd.*, 56 U.S.P.Q.2d 1343 (4th Cir. 2000). Once Petitioner establishes a *prima facie* case of abandonment, the burden of production then shifts to Registrant to rebut the prima facie showing with evidence. *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.*, 13 U.S.P.Q.2d 1307 (Fed. Cir. 1989).

A. Registration No. 549,924

There is no dispute about the abandonment of Registration No. 549,924. Petitioner's Managing Member testified that his investigation did not uncover any JONATHAN LOGAN brand apparel at retail from 2000 to 2004. (Pet. Tr. Dep. at 10-12). Registrant has failed to rebut that assertion in connection with the goods listed in Registration No. 549,924, women's dresses. Indeed, Registrant failed to produce in discovery or introduce at trial a single document that references or confirms the sale of JONATHAN LOGAN brand women's dresses in U.S. commerce at any point after the registration was renewed on December 13, 2001. Petitioner has, therefore, established a *prima facie* case of abandonment. Since Registrant will be unable to meet its burden of production to show use of the mark in commerce during the relevant time period, Registration No. 548,924 must be cancelled.

B. Registration No. 937,651

The testimony of Petitioner's Managing Member also establishes a *prima facie* case of abandonment for Registration No. 937,651. (Pet. Tr. Dep. at 10-12). To rebut the claim of abandonment, Registrant, came forward with documents purporting to show sales of JONATHAN LOGAN brand clothing to a single retailer, Burlington Coat Factory, in 2004, 2005 and 2006. This evidence does not serve to meet Registrant's burden of production to withstand the claim of abandonment, for the following reasons.

First, as set forth in the above Motion to Strike, all of the documents Registrant sought to introduce at trial should be excluded on evidentiary grounds and should not be considered for purposes of adjudicating the abandonment claim. If Petitioner's motion is granted in full, Registrant will have no admissible documentary evidence to support its case, and all testimony related to those documents must also be excluded under Fed. R. Evid. 602 because neither Mr. Haigney nor Mr. Admji have any personal knowledge of sales of JONATHAN LOGAN brand merchandise from 2002 to 2005. Hence, Registrant will be devoid of any evidence to rebut Petitioner's claim of abandonment.

Even if the Board allows some of Registrant's documentary evidence into the trial record, Petitioner will still prevail in this proceeding for two reasons. As a threshold matter, it is important to note that the scant evidence of sales to retail customers during 2004 and 2005 does not meet the threshold requirements for demonstrating use of the mark in commerce. It is well settled that to satisfy the use requirement, application of the trademark must be sufficient to maintain "the public's identification of the mark with the proprietor." *Stetson v. Howard D. Wolf & Assocs.*, 955 F.2d 847, 851 (2d Cir. 1992) (quoting *Silverman v. CBS, Inc.*, 870 F.2d 40, 48 (2d Cir. 1989)). Sporadic, casual or nominal use of the mark over a three-year period is

insufficient to establish the requisite level of use in commerce. *Pilates, Inc. v. Current Concepts, Inc.*, 57 U.S.P.Q.2d 1174 (S.D.N.Y. 2000).

Moreover, Registrant's invoices and the records from Burlington Coat Factory that are for the applicable time period are inherently unreliable on their face, and should not be given any weight in the abandonment analysis even if they are admitted into evidence because of the absence of a competent witness to interpret the information contained in the invoices. For example, Exhibit 13 contains invoices that fail to indicate or suggest that they are for JONATHAN LOGAN brand merchandise. The cover letter from Wells Fargo Bank to the prior counsel of record for Delan Enterprises attaching the invoices reflects equivocation as to the authenticity of the invoices -- "I believe they would say they were for Jonathan Logan goods ...." (Adj. Tr. Dep., Exh. 13). The letter then goes on to say "They may also be sending me some 2004 invoices, but I am not holding my breath." No such invoices for 2004 were ever produced.

The same is true for the invoices contained in Exhibits 11 and 12 that are from the Maklihon Mfg. Corp. (OSU0073 and OSU0087). These pages bear no indication that they are for JONATHAN LOGAN brand merchandise. Nor do the invoices in Exhibits 11, 12 and 13 indicate the type of garment in any manner. Thus, even assuming, *arguendo*, that the invoices reflect sales of JONATHAN LOGAN merchandise, there is no way to confirm that the goods are the same as those covered by Registration No. 937,651. The same is true for the invoices from Burlington Coat Factory. (*See* Haig. Tr. Dep., Exhs. 3-8). As a result, Registrant has failed to show an adequate link between the bare invoices and the goods covered in Registration No. 937,651. Absent such proof, Registrant cannot sustain its burden of production to withstand Petitioner's *prima facie* case of abandonment.

One final point regarding the status of the parties' respective rights in the JONATHAN LOGAN mark merits consideration. It is important to keep in mind that Petitioner has a constructive use priority date of August 19, 2004 based on the filing of its intent to use application. If Petitioner prevails in this proceeding based on Registrant's failure to use the mark in commerce from at least May 31, 2002 to May 31, 2005 and Registrant's registrations are cancelled, Petitioner will have superior rights over Registrant in terms of registration of the JONATHAN LOGAN mark once its federal registration for the JONATHAN LOGAN mark issues. Indeed, Petitioner will have superior registration rights over Registrant irrespective of any use in commerce of the mark by Registrant that post-dates Petitioner's constructive use priority date of August 19, 2004.

CONCLUSION

For the reasons stated herein, Petitioner respectfully urges the Board to sustain this cancellation proceeding, to cancel Registration Nos. 549,924 and 937,651 for the mark JONATHAN LOGAN, and for such other and further relief as the Board deems just and proper.

Dated: Norwalk, Connecticut
January 23, 2008

Respectfully submitted,

THE PETITIONER,

By: _____

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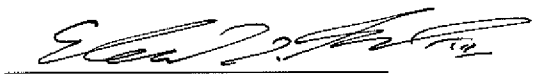
Attorneys for Petitioner 200 Kelsey Associates, LLC

CERTIFICATE OF SERVICE AND FILING

This certifies that a copy of the foregoing Trial Brief and Motion to Strike were served on the Registrant on the date indicated below by placing an envelope and depositing same with the United States Postal Service as First Class Mail, Postage Prepaid, addressed to Registrant's counsel of record:

Harlan Lazarus, Esq.
Lazarus & Lazarus, P.C.
240 Madison Avenue, 8th Floor
New York, NY 10016

and further certifies that the Trial Brief and Motion to Strike were filed with the Trademark Trial and Appeal Board via the Board's electronic filing system on the date indicated below.



Edmund J. Ferdinand, III

Dated: January 23, 2008